

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

27434

FILE: B-210223.4; B-210223.5 **DATE:** February 13, 1984

MATTER OF: Everett Dykes Grassing Company; Peach
State Sanitation Co., Inc.

DIGEST:

1. Where the low bidder offers a lesser monthly price for the first program year than for subsequent years in a multiyear procurement, despite a requirement that the unit price be the same for all years, but the low bid would be low even if contract were to be terminated after the first operational month, and no prejudice would result to other bidders from acceptance of the low bid since difference between low bid and second low bid indicates low bid would have been low even if the second low bidder had been permitted to bid in the same manner, the low bid may be accepted.
2. A protest that a solicitation is defective because its provisions are subject to inconsistent interpretations is untimely where it is not filed until after bid opening, since our Bid Protest Procedures, 4 C.F.R. § 21.2 (b)(1) require that protests based on solicitation improprieties apparent prior to bid opening must be filed prior to bid opening to be timely.
3. Since an unbalanced bid is unacceptable only if it is both mathematically unbalanced, i.e., bid items do not carry their fair share of the cost of the work plus profit, and materially unbalanced, i.e., there is a reasonable doubt that award to the bidder will not result in the lowest ultimate cost to the government, then a low bid significantly lower than all other bids and resulting in the lowest ultimate cost to the government even if the procurement is terminated after the first operational month is not unacceptable.

Everett Dykes Grassing Company and Peach State Sanitation Co., Inc., protest any award by the Department of the Air Force to Mark Dunning Industries, Inc. (MDI),

66-1744

under invitation for bids No. F09650-83-B0009 for the collection, transportation and disposal of refuse generated at Robins Air Force Base, Georgia. Everett Dykes and Peach State allege, among other things, that MDI's bid was nonresponsive to the solicitation requirement that the unit price offered for each item shall be the same for all years in the multiyear procurement. We dismiss the protest in part and deny the remainder.

The IFB, as amended, solicited bids for the collection, transportation and disposal of refuse for 5 program years. Bidders were instructed to price several items in the first program year, including: item No. 0001, a 2-month orientation period during which the contractor could become further familiar with the nature of the required work, prepare plans and procedures for accomplishing that work, and obtain and place necessary equipment; item No. 0002AA, a monthly rate for the first 10 operational months of refuse collection, transportation and disposal; and item No. 0002AC, an hourly rate for an estimated 80 hours of extra work over and above that otherwise required by the specifications. For each of the second through the fifth program years, bidders were required to price a monthly rate for 12 months of refuse collection, transportation and disposal and, in another item, an hourly rate for an estimated 96 hours of extra work. Bidders were cautioned that the estimates of extra work were for evaluation and funding purposes only, that the government did not guarantee that the estimated amount of work would indeed be required, and that the fixed hourly rate offered would apply regardless of the amount of extra work actually required.

The solicitation provided in section L-29 that:

"(b) The unit price offered for each item in the multi-year requirements shall be the same for all program years included therein."

Bidders were required to submit a price for all multiyear requirements and were informed that bids would be evaluated by adding the extended prices, i.e., the unit price multiplied by the quantity, for each item in the schedule.

The Air Force received seven bids in response to the solicitation, with MDI, Everett Dykes and Peach State submitting the apparent low bid, second low bid and third low bid respectively, as indicated below.

| -----FIRST PROGRAM YEAR----- | | | | SECOND THROUGH THE FIFTH PROGRAM YEAR | | |
|------------------------------|---------------------|--|---|--|--|--------------|
| Item | 0001 Orientation | 0002AA Monthly rate for initial 10 mos. of the Opera- tional Per- formance Period (subtotal) | 0002AC Hourly rate for esti- mated 80 hrs of excess work (subtotal) | -2AA Monthly rate for 12 months of the Opera- tional Perform- ance period (subtotal) | -2AC Hourly rate for estimated 96 hrs of excess work (subtotal) | Total |
| MDI | \$ 5,000 | 36,639.91 | 23.08 | 37,139.91 | 23.08 | 2,164,823.90 |
| | | (366,399.10) | (1846.40) | (445,678.92) | (2215.68) | |
| Everett Dykes | \$20,000 | 40,500 | 20 | 40,500 | 20 | 2,378,280 |
| | | (405,000) | (1600) | (486,000) | (1920) | |
| Peach State | 0 | 41,792 | 20 | 41,792 | 20 | 2,433,216 |
| | | (417,920) | (1600) | (501,504) | (1920) | |

Since MDI offered a monthly rate of \$36,639.91 for the 10 operational months of the first program year but offered a monthly rate of \$37,139.91 for the second through the fifth program years, the Air Force initially found MDI's bid nonresponsive to the IFB requirement that the unit price for each item be the same for all program years. However, MDI responded after bid opening that it in effect had offered the same monthly rate for all program years, contending that the \$5,000 price it had offered for the orientation period in the first program year should be amortized over the 10 operational months of the first program year to yield a monthly rate of \$37,139.91 ($(\$5000 \div 10) + 36,639.91 = \$37,139.91$), the same monthly rate offered for subsequent program years. The Air Force found MDI's bid in this regard to be consistent with a reasonable interpretation of the specifications, given what the Air

Force believed to be an absence of IFB provisions to the contrary, and determined that, in any case, even if MDI had deviated from the IFB, the other bidders would not be prejudiced by acceptance of MDI's bid. The Air Force accordingly determined MDI's otherwise low bid should be accepted. Everett Dykes and Peach State had meanwhile filed this protest with our Office.

Everett Dykes and Peach State allege that MDI's bid should have been rejected as nonresponsive to the level pricing requirement because the unit price of \$36,639.91 per operational month offered by MDI for the first program year was different than the unit price of \$37,139.91 per operational month offered for succeeding program years. However, we need not consider whether MDI's bid indeed deviated from the specifications, since even if it did deviate, we believe that the Air Force did not err in accepting the bid.

In order to ensure that all bidders compete on an equal footing and thereby protect the integrity of the competitive bidding system, we have held that agencies generally may not accept a bid deviating from the material requirements of the solicitation. See Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243. However, where acceptance of a deviating bid would result in a contract which would satisfy the government's actual needs and would not prejudice any other bidder, we have permitted acceptance, notwithstanding the fact that the bid was technically nonresponsive, because the integrity of the competitive bidding system was not thereby adversely affected. See Union Carbide Corporation, supra. Consistent with that rationale, we held that in certain circumstances it was improper to reject a bid which did not adhere to a level pricing provision for a multiyear contract. Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD 301. In that case, the low bidder added its price for a nonrecurring cost item to its price for the first program year item and accordingly offered a higher price for the first program year than for each of the 2 succeeding program years, despite a solicitation provision requiring the unit price to be the same for all program years. Since the bidder's overall low bid would still have been low even if the procurement was canceled after the first program year, and since no prejudice would result to other bidders by acceptance of the low bid because the spread between the first and second low bidders was so significant that the second low bidder would not have been

low even if it had been permitted to bid in the same deviant manner, we held that the agency's rejection of the low bid as nonresponsive was improper. See also International Harvester Company, B-212341, September 12, 1983, 83-2 CPD 313.

We agree with the Air Force that acceptance of MDI's bid did not prejudice other bidders since the spread between MDI and Everett Dykes, the apparent second low bidder, is so large, with Everett Dykes' bid \$213,456.10 or 9.86 percent more than that of MDI, that even if Everett Dykes had been able to vary its monthly rate for each year of the multiyear procurement it would still not have been low. Nor do we believe that acceptance of MDI's bid otherwise prejudiced the government, since MDI agreed to satisfy the government's actual needs at a price which was not only \$213,456.10 less than that of the second low bidder over all 5 program years, but which was also low even if the contract was canceled or terminated after the first operational month.

Peach State also alleges that the provisions of the IFB are subject to inconsistent interpretations in regard to the effect of the requirement for the level pricing of items on the treatment of the orientation period, item No. 0001. However, we need not address the merits of this allegation since it was not raised until after bid opening and is therefore untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based on solicitation improprieties apparent prior to bid opening, such as the inconsistencies alleged here, must be filed prior to bid opening to be timely. See Gas Turbine Corporation, B-210411, May 25, 1983, 83-1 CPD 566.

Peach State further contends that the cost of labor in performing a contract awarded under this solicitation would be a relatively insignificant amount and that the preponderance of all costs would be nonrecurring costs, such as those arising from the initial acquisition and placement of refuse receptacles, trucks and other major equipment, which necessarily would be incurred during the orientation period. Peach State therefore concludes that,

"Accordingly any bidder, other than the incumbent contractor, that does not reflect an amount (unit price) under Item 0001 (two months) that approximates or exceeds the

amount (unit price) under Item 0002AA must be suspect of an 'unbalanced bid.'"

Peach State then indicates that it is "highly suspect" that all bidders but Peach State, the incumbent contractor, submitted unbalanced bids.

Unbalanced bidding is the practice of bidding high on some items and low on other items. We have recognized two aspects to unbalanced bidding, both of which must exist before a bid is deemed nonresponsive. First, the bid must be mathematically unbalanced. This involves a determination as to whether each bid item carries its share of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect is that the bid must be materially unbalanced, that is there must be a determination that there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the government. See Microform Inc.--Reconsideration, B-208117.2, September 27, 1983, 83-2 CPD 380; Jimmy's Appliances, 61 Comp. Gen. 444 (1982), 82-1 CPD 542.

Even if we were to find MDI's bid mathematically unbalanced, Peach State has failed to show that there is a reasonable doubt that award to MDI would not result in the lowest ultimate cost to the government. See Contra Costa Electric, Inc., B-200660, March 16, 1981, 81-1 CPD 196 (protester has burden of showing that bid is unbalanced). The Air Force is contracting to pay a fixed price for a specified level of services, except for the provisions relating to possible extra working hours, the cost of which is miniscule when compared to the total price offered by MDI and Everett Dykes. Thus, there is no reason to expect that MDI could recoup any of the loss alleged to be likely during the orientation period by securing payment for subsequent services at a rate which is both in excess of its costs for those subsequent services and not taken into account during the initial evaluation for award. Although termination of the contract is not to be expected given the likely continuing nature of the requirement for refuse collection and disposal and the reasonable expectation that continued funding will be available for services of this nature, see Reliable Trash Services, B-194760, August 9, 1979, 79-2 CPD 107, we again note that MDI has offered a

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price which is low even if the procurement should be terminated after the first operational month.

The protest is dismissed in part and denied in part.

for *William J. Aorlan*
Comptroller General
of the United States